UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON

S&T OIL EQUIPMENT & MACHINERY LTD., VALERIAN SIMIRICA,	)	FILED UNDER SEAL
vs.	)	Cause No. H-11-542
JURIDICA INVESTMENTS, LTD., JURIDICA CAPITAL MANAGEMENT LIMITED JURIDICA CAPITAL MANAGEMENT (US) INC.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS IN FAVOR OF ARBITRATION

Plaintiffs signed an Investment Agreement that requires them to submit all disputes with Juridica Investments Limited ("JIL") and its agents to binding arbitration. Indeed, the agreement's first page includes the following capitalized, boldface text, which is conspicuously placed just above the date – "THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION." Plaintiffs were fully aware of this provision - before executing it, their lawyers provided a letter expressly stating that any court presented with an action or proceeding "arising out of or relating to the Investment Agreement . . . would [be] governed by the mandatory arbitration provisions of Section 15."

Despite the above facts and despite JIL's prior filing of an arbitration against them, Plaintiffs initiated this case. There is no factual or legal basis for ignoring the Agreement's mandatory arbitration provision, and Defendants hereby move to dismiss the Complaint pursuant to Section 15.2 of the parties' Agreement, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and the Federal Arbitration Act (the "FAA").

I. STATEMENT OF FACTS

Juridica Investments Limited ("JIL") is a limited company organized and existing under the laws of Guernsey, Channel Islands, which is its sole place of business. (Sullivan Aff. ¶ 4.)[1] JIL provides strategic capital to the business community and the legal markets for corporate claims, otherwise referred to as "alternative litigation finance." *Id.* at ¶ 5. This market is an alternative to more traditional forms of financing litigation, including self-financing or financing through attorney contingency fees. *Id.* JIL participates in one segment of this broader market, focusing exclusively on providing litigation financing to sophisticated businesses that are involved in expensive, complex, high-risk commercial legal disputes. *Id.*

JIL has an Investment Management Agreement with Defendant Juridica Capital Management Limited ("JCML"), which is also a limited company organized and existing under Guernsey law. *Id.* at ¶ 6. JCML's sole place of business is in Guernsey. *Id.* The other Defendant, Juridica Capital Management (US) Inc. ("JCMUS"), is a Delaware corporation and an indirect, wholly-owned subsidiary of JCML. *Id.* JCMUS was incorporated on November 14, 2008 – more than five (5) months after Plaintiffs executed the Agreement with JIL. *Id.*

Plaintiff Valerian Simirica is a sophisticated, international businessman. *Id.* at ¶ 8. Through his company, Plaintiff S&T Oil Equipment and Machinery Ltd., Simirica purchased a large, formerly state-owned industrial company in Romania that was privatized by the government of Romania in 2002. *Id.* The company – Nitramonia SA – converted natural gas into ammonia. At one point, Nitramonia accounted for 20% of Romania's daily natural gas consumption. *Id.* at ¶ 11.

[1] Mr. Sullivan's affidavit is attached hereto as Exhibit 1.

In 2007, the Romanian government terminated the privatization contract with Plaintiffs, seized the Nitromonia assets, and sold them for scrap value. *Id.* at ¶ 12. In response, Plaintiffs hired the international law firm of King & Spalding LLP to file an international arbitration against the government of Romania (the "Romanian Arbitration"). *Id.* at ¶ 13. Plaintiffs filed the Romanian Arbitration in the International Center for the Settlement of Investment Disputes ("ICSID"), which is located in Washington D.C. *Id.* Plaintiffs also filed an action in a Romanian court to challenge the seizure. *Id.*

In 2008, Plaintiffs sought an investor to finance the Romanian Arbitration. *Id.* at ¶¶ 9, 14. Plaintiffs engaged Global Arbitration Litigation Services Ltd. ("GALS") – a company based in London – to identify and solicit potential investors. *Id.* at ¶¶ 9-10. GALS approached JIL about investing in the Romanian Arbitration, and, because the arbitration fell within the type of sophisticated, commercial cases in which it typically invests, JIL agreed. *Id.* at ¶¶ 9, 14.

JIL and Plaintiffs subsequently negotiated and executed the Investment Agreement, which was filed with the Court by Plaintiffs (the "Agreement," attached as Exhibit 2 to Mr. Simirica's affidavit in support of Plaintiffs' motion for injunctive relief). *Id.* at 15. Under that Agreement, JIL agreed to reimburse Plaintiffs' counsel for certain fees incurred to that date and to make certain funds available to cover the remaining costs of the Romanian Arbitration. *Id.* JIL's total investment under the Agreement was to be in excess of $2.8 million. *Id.*

The Agreement includes a mandatory arbitration provision that requires all disputes between the parties and other identified entities to be submitted to binding arbitration. *Id.* at ¶ 16. In fact, the very first page of the Agreement notified Plaintiffs of this fact. Only four pieces of information are contained on this page – the parties to the agreement, the date, a copyright

notice, and the following sentence, in at least 14 point, bold type: "THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION." *Id.*

Section 15.0 then contains nine (9) separate paragraphs setting forth the scope and details of the arbitration provision. *Id.* at ¶ 17. Specifically, Section 15.2 states that all disputes – regardless of the theory of liability – are subject to arbitration:

> Except as otherwise (but only to the extent) specified in Section 16 [which deals with foreclosing on security interests], all actions, disputes, claims and controversies under common law, statutory law or in equity of any type or nature whatsoever, whether arising before or after the date of this Agreement and whether directly or indirectly relating to: (a) this Agreement and/or any amendments and addenda hereto, or the breach, invalidity or termination hereof; (b) any previous or subsequent agreement between ASSIGNEE AND ASSIGNTORS; (c) any act committed by ASSIGNEE or by any parent company, subsidiary or affiliated company of ASSIGNEE (the "ASSIGNEE Companies"), or by any employee, agent, officer or director of an ASSIGNEE Company whether or not arising within the scope and course of employment or other contractual representation of the ASSIGNEE Companies (provided that such act arises under a relationship, transaction or dealing between ASSIGNEE and ASSIGNORS); (d) any act committed by ASSIGNORS or by any parent company, subsidiary or affiliated company of S&T (the "ASSIGNOR Companies"), or by any employee, agent, officer or director an of ASSIGNOR Company whether or not arising within the scope and course of employment or other contractual representation of ASSIGNOR Companies (provided that such act arises under a relationship, transaction or dealing between ASSIGNEE and ASSIGNORS); and/or (e) any other relationship, transaction or dealing between ASSIGNEE and ASSIGNOR (collectively the "Disputes"), will be subject to and resolved by binding arbitration.

Id. at ¶ 17.

Section 15.3 provides that all arbitrations under the Agreement shall be conducted in accordance with the Rules of the London Court of International Arbitration (the "LCIA"). *Id.* at 18. Section 15.4 provides that the "seat and situs of the arbitration and of all oral arbitration hearings will be in St. Peter Port, Guernsey, Channel Islands" – the site of JIL's sole place of

business and the jurisdiction under whose laws JIL is organized. *Id.* at 19. The Agreement also provides that it shall be governed by the laws of England and Wales. *Id.* at ¶ 20; Agreement § 14.2.1.

Prior to executing the Agreement, Plaintiffs obtained an opinion from Stuart Spiegel of the Law Offices of Spiegel and DeMars in Chicago, Illinois, with respect to the enforceability of the arbitration provision. *Id.* at ¶¶ 21-22. In a written opinion dated May 23, 2008 (five days before Plaintiffs entered into the Investment Agreement), Mr. Spiegel advised Plaintiffs that the Agreement was governed by the laws of England and Wales and that it contained a mandatory arbitration provision that would be enforced by state and federal courts in Plaintiffs' home jurisdiction, Illinois:

> In any action or proceeding arising out of or relating to the Investment Agreement in any court of the State of Illinois or in any federal court sitting in the State of Illinois, such court would recognize and give effect to the provisions of the Investment Agreement wherein the parties thereto agree that the Investment Agreement shall be governed by, and construed in accordance with, the laws of England and Wales and that all Disputes are governed by the mandatory arbitration provisions of Section 15.

Id. at 22, Exh. 1.

JIL paid more than $2.8 million in fees and costs under the Investment Agreement throughout 2008 and 2009. *Id.* at ¶ 23. In August 2009, King & Spalding, Plaintiffs' counsel in the Romanian Arbitration, abruptly withdrew. *Id.* at ¶ 24. In its follow-up investigation, JIL learned that Plaintiffs had made material misrepresentations and omissions during the time period leading up to execution of the Agreement. *Id.* JIL responded by filing a request for arbitration with the LCIA against Plaintiffs on December 22, 2010, alleging breach of the Agreement, fraud and related claims. *Id.*

Plaintiffs have thus far refused to respond to the pending arbitration in the LCIA. *Id.* at ¶ 25. Instead, Plaintiffs filed this action on February 14, 2011. *Id.* Plaintiffs' Complaint alleges claims against JIL, JCML and JCMUS. Plaintiffs purport to plead claims for RICO under 18 U.S.C. §1962; interference with a contractual relationship; fraud; conspiracy; aiding and abetting breach of fiduciary duty; declaratory judgment and an injunction. *Id.* at 26; Dkt. No. 1.

II. ARGUMENT

Plaintiffs' attempt to circumvent the Agreement's mandatory arbitration provision implicates two (2) federal statutes – the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. §§ 201 *et seq.*) and the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*). Both statutes require dismissal.

A. The Convention applies and requires Plaintiffs to arbitrate their claims.

Congress enacted the Convention as a means of enforcing international arbitration agreements in much the same manner that the FAA enforces all other arbitration agreements. The Convention therefore explicitly provides for the enforcement of commercial arbitration agreements that involve a foreign citizen or where the parties' "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202.

The Convention and the FAA are found in the same part of the U.S. Code and the Fifth Circuit has instructed that they operate "concurrently" with one another. *See Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 341 (5th Cir. 2004). The same strong presumption in favor of arbitration therefore applies under both the FAA and the Convention. *See, e.g., Cater v. Countrywide Credit Industr., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004) ("There is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity."). As such, "ambiguities as to the

scope of the arbitration clause itself [are] resolved in favor of arbitration." *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989). "Whenever the scope of an arbitration clause is in question, the court should construe the clause in favor of arbitration." *City of Meridian*, 721 F.2d 525, 527 (5th Cir. 1983). As the Supreme Court has instructed:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

Moses H. Cone Memorial Hospital v. Mercury, 460 U. S. 1, 25 (1983).

The Fifth Circuit has determined that "courts conduct only a very limited inquiry" in determining whether to enforce an arbitration clause under the Convention. *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 339 (5th Cir. 2004) (citing *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir.1985)). According to these authorities, "a court should compel arbitration if (1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen." *Freudensprung*, 379 F.3d at 339. "[If] these requirements are met, the Convention requires the district court[ ] to order arbitration . . . unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Sedco*, 767 F.2d at 1146.

In this case, all of the *Freudensprung* factors are satisfied, and Plaintiffs are required to arbitrate their claims.

1. There is a written agreement to arbitrate Plaintiffs' claims.

As set forth above, the Agreement between the parties contains a mandatory arbitration provision that requires all disputes between the parties to be submitted to binding arbitration. (Agreement § 15.2.) Section 15.2 applies to "all actions, disputes, claims and controversies under common law, statutory law or in equity of any type or nature whatsoever, whether arising before or after the date of [the] Agreement . . . ." It applies to claims against JIL and "any parent company, subsidiary or affiliated company . . . [and] any employee, agent. Officer or director . . . ." *Id.* Accordingly, there is no dispute that the Agreement's arbitration provision covers all of Plaintiffs' claims in this case.

2. The Agreement provides for arbitration in a Convention signatory nation.

Sections 15.3 and 15.4 require the arbitration to be filed with the London Court of International Arbitration and the hearings to be conducted in Guernsey, Channel Islands. According to the website maintained by the United Nations Commission on International Trade Law, the United Kingdom of Great Britain and Northern Ireland is a signatory nation to the Convention, and the United Kingdom extended the territorial protection of the Convention to Guernsey in 1985.[2]

3. The Agreement arises from a commercial relationship.

As described above, Plaintiffs' asserted claims arise from alleged acts committed in connection with JIL's investment in Plaintiffs' international arbitration against the government of Romania. The parties' agreement to arbitrate undisputedly arises in connection with their commercial relationship.

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[2] *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on February 22, 2011).

4. JIL is not an American citizen; but, even if it were, the Convention would still apply because of the Agreement's connections to foreign states.

The Convention provides that an entity is not a foreign citizen if "it is incorporated or has its principal place of business in the United States." 9 U.S.C. § 202. Plaintiffs admit that Juridica is organized under the laws of Guernsey. They contend, however, that JIL does not have its principal place of business in Guernsey. Instead, Plaintiffs allege that JIL is under the exclusive control of JCML and JCMUS and that this control is exercised from New York.

Plaintiffs assertions are simply not supported by the record. JIL is a closed-ended investment company whose shares are listed on the AIM, an alternative market operated by the London Stock Exchange. (Sullivan Aff. ¶ 5.) The overwhelming majority of JIL's shares are held by major British investment institutions. *Id.* JIL is incorporated in Guernsey; it maintains its only offices there; and its registered agent is located there. *Id.* at ¶ 5. JIL does not have any offices, officers or employees outside of Guernsey. *Id.*

JIL is controlled and directed by a three-member board of directors. *Id.* at ¶ 27. JIL's board consists of Lord Daniel Brennan, Q.C., a British citizen who lives in England; Richard D. Battey, a British citizen who lives in Guernsey; and J. Kermit Birchfield, and American citizen who lives in the United States. *Id.* JIL's board of directors meets in-person on a quarterly basis. *Id.* The vast majority of the board meetings have been conducted in Guernsey. *Id.*

All contracts entered into by JIL are executed and delivered in Guernsey. *Id.* at ¶ 28. JIL maintains its accounts in Guernsey; it holds its funds in banks located in Guernsey; it disburses funds used for its investments from Guernsey; and all proceeds JIL receives from its investments are remitted to bank accounts in Guernsey. *Id.*

The record evidence summarized here establishes that JIL is a citizen of Guernsey with

its principal place of business in Guernsey.

Moreover, even if there were a dispute as to the location of JIL's principal place of business (which JIL does not concede), the Convention still requires arbitration because the parties' "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. The Convention applies even in cases involving U.S. citizens where "there is a 'reasonable relation' between the parties' commercial relationship and some 'important foreign element.'" *Freudensprung*, 379 F.3d at 339 (5th Cir. 2004) (citing *Jones v. Sea Tow Servs., Inc.*, 30 F.3d 360, 366 (2d Cir.1994); *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 481 (7th Cir.1997)). In other words, the Convention would apply here even if JIL's principal place of business were in New York so long as "there is a reasonable connection between the parties' commercial relationship and a foreign state that is independent of the arbitral clause itself." *Freudensprung*, 379 F.3d at 341.

There is an undeniable "foreign element" in the current dispute. Plaintiffs entered into a sophisticated commercial transaction with a Guernsey company that required arbitration in that company's home forum. The Investment Agreement itself says that it has been executed in Guernsey and that performance of its terms would occur in Guernsey. (Agreement ¶ 27.) JIL did in fact execute the Agreement in Guernsey, and it wired its investment under the Agreement from its Guernsey bank accounts. (Sullivan Aff. ¶ 28.) Performance in a foreign country qualifies an agreement for international arbitration by the very terms of the Convention, which states that a foreign arbitration clause must be enforced if the parties' contract "envisages performance or enforcement abroad." 9 U.S.C. § 202.

In addition, the "foreign element" of the case is supported by the fact that the underlying international arbitration for which JIL provided financing involved the purchase of a Romanian company and the Romanian government's subsequent expropriation of that property. These matters more than satisfy the required nexus with foreign nations to require Plaintiffs to arbitrate this matter in a foreign forum.

These foreign connections distinguish this matter from the case on which Plaintiffs rely in their Motion for a Temporary Restraining Order, *Ensco Offshore Co. v. Titan Marine, LLC*, 370 F. Supp. 2d 594 (S.D. Tex. 2005). *Ensco* was a dispute concerning an oil rig that was technically in international waters but was in fact just off the coast of Louisiana. *Id.* There were no other foreign contacts involved in Ensco. *Id.* None of the parties were from a foreign country, none of the facts of the dispute arose from events in a foreign forum and there was no performance anticipated in a foreign country. *Id.* Given the complete lack of a connection between the facts of *Ensco* and any foreign country, the court in that case had little difficulty finding that there was not a sufficient relationship with any foreign country for the case to be arbitrated under the Convention. *Id.* at 601.[3]

Because all of the *Freudensprung* factors are satisfied, Plaintiffs must arbitrate their claims, and the Complaint should be dismissed.

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[3] *See., e.g., id.* at 601 ("The above-cited history indicates that Congress did not envision American companies with a dispute just off the Gulf Coast with eventual performance in Texas to be property, performance, or enforcement 'abroad.' Not one of the cases cited by the parties or found by the Court have found the Convention to apply to a situation where two American entities were entangled in an offshore dispute where the envisaged performance was in the United States.").

B. Alternatively, the FAA applies and requires Plaintiffs to arbitrate their claims.

Even if the Convention did not apply, the Agreement falls within the FAA, and its arbitration provision must be enforced. The Federal Arbitration Act generally applies to arbitration provisions contained in contracts involving "commerce." 9 U.S.C. § 2. Section 1 defines "commerce" to include both interstate commerce and commerce with foreign nations. 9 U.S.C. § 1. Section 2 of the Act states that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity of the revocation of any contract." 9 U.S.C. § 2.

"Arbitration is 'a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Paine Webber Inc. v. The Chase Manhattan Private Bank (Switzerland),* 260 F.3d 453, 462 (5th Cir. 2001) (quoting *United Steel Workers of Amer. V. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582 (1960)). "Therefore, the Court must first determine whether there is a valid agreement between the parties to arbitrate their dispute." *Prothro v. Coca-Cola Enter. Inc.,* H-09-3716, 2010 U.S. Dist. LEXIS 5006, *7 (S.D. Tex. Jan. 22, 2010). "'Although there is a strong federal policy favoring arbitration, this federal policy . . . does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'" *Id.* (quoting *Will-Drill Resources, Inc. v. Samson Resources Co.,* 352 F.3d 211, 214 (5th Cir. 2003)). "In deciding whether the parties entered into a valid agreement to arbitrate, the Court applies general contract principles. *Id.*

There can be no dispute that the Agreement's arbitration provision applies to all of the claims Plaintiffs assert in their Complaint. Section 15.2 unambiguously requires arbitration of all disputes between the parties and other identified entities, including disputes relating to the Agreement and disputes relating to any act committed by JIL or any parent company, subsidiary,

affiliated company or agent. (Agreement § 15.2.) This broadly worded provision applies to all of Plaintiffs' claims, including their claims under RICO and for fraud. *See, e.g., Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 677 (5th Cir.) ("In cases involving the Sherman Act, the Securities Exchange Act of 1934, the civil protections of the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Securities Act of 1933, the [Supreme] Court has held substantive statutory rights enforceable through arbitration.") (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987)); *Chevron Nig. Ltd. v. Contract Operators, Inc.*, 1:09-CV-821, 2010 U.S. Dist. LEXIS 40786, at *10-*11 (E.D. Tex. April 26, 2010) (holding that claims for fraud and tortious interference were governed by arbitration provision).

Accordingly, whether analyzed under the Convention or the FAA, Section 15.2 requires Plaintiffs to submit their claims to arbitration.

C. None of Plaintiffs' defenses to the Agreement's arbitration provision have any merit – the provision is not unconscionable; nor was it obtained by fraud.

Attempting to avoid the Agreement's arbitration provision, Plaintiffs assert that the arbitration clause is unconscionable and cannot be enforced to require arbitration in Guernsey. They argue that the arbitration clause is substantively and procedurally unconscionable because (1) they believe LCIA arbitration is too burdensome; (2) a conflict of interest exists with the LCIA based on false speculation about one of JIL's board members; and (3) S&T did not have conflict-free representation in entering the Investment Agreement. None of these contentions are supported by the record before the Court or settled precedent in this Circuit.

First, LCIA arbitration in Guernsey is no more burdensome than arbitration before a U.S. alternative dispute provider. Plaintiffs primarily cite the cost of travel to Guernsey. However, the LCIA rules make clear that any such trip would be at most a one-time cost, as the arbitration would only require a single in-person hearing. That cost may never be incurred, as the LCIA

rules only require a hearing with live witnesses if one of the parties has demanded it, which has not yet occurred. By contrast, Plaintiffs have not found it burdensome to bring this federal action many hundreds of miles away from their principal place of business in Illinois. Indeed, they did not find it burdensome to purchase a business in Romania, which presumably would require frequent international travel to a location even further from Illinois than Guernsey, which has its own international airport, and is not far from either France or England.

The Guernsey arbitration is likely far less burdensome than this lawsuit, which Plaintiffs voluntarily filed. Plaintiffs claim that the burdens of a Guernsey arbitration are excessive simply because of the costs of airfare. Comparing the costs of airfare to Houston with flights to Guernsey is simplistic at best. The arbitration will require at most one flight to Guernsey. This case, however, would likely require Simirica and other Illinois witnesses to make many trips to Houston for purposes of hearings, discovery and trial. Given that a hearing is set in this matter for February 24, 2011, this case already has the same number of in-person hearings scheduled as is planned for the *entire* LCIA arbitration, even though the Complaint has just been filed. Plaintiffs therefore make an apples-to-oranges comparison by claiming that airfare to Guernsey exceeds airfare to Houston, which itself nearly reaches $1,000. Even if the airfare rates Plaintiffs cite are correct, Plaintiffs simply ignore that they will incur these repeated costs in litigating this case over a period of years in this forum.

Indeed, the dispute underlying this case ultimately concerns Plaintiffs attempt to operate a business in Romania. It is disingenuous for Plaintiffs to claim that it is unduly burdensome for them to arbitrate in a foreign forum when S&T and Simirica themselves agreed to operate a foreign corporation that undeniably would require frequent contacts with and travel to Romania.

Similarly, Plaintiffs bemoan the fact that the LCIA would require the appointment of a three-arbitrator panel, which obviously would cost more than having a single arbitrator. A three-arbitrator panel is not unique to the LCIA. A similar arbitration brought in the U.S. would very likely have a three-member arbitration panel given that the matter in dispute exceeds $1,000,000. *See* AAA Rules for Large, Complex Commercial Disputes, Rule L-2 (making three-arbitrator panels the norm for arbitrations where the amount in controversy is more than $1,000,000) (available at http://www.adr.org/sp.asp?id=22114); Financial Industry Regulatory Authority Rule 12401(c) ("If the amount of a claim is more than $100,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.") (available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=607).

Simirica is a sophisticated commercial businessman capable of transacting international business. Plaintiffs have experience with international transactions, having purchased a commercial venture in Romania. It was no secret that the Investment Agreement included a binding arbitration clause, as the title page of the Investment Agreement includes the phrase: "**THIS AGREEMENT IS SUBJCET TO BINDING ARBITRATION.**" (Sullivan Aff. ¶ 16.) Given Plaintiffs' level of sophistication, they were more than capable of protecting their rights and deciding for themselves whether these procedures for dispute resolution were acceptable. Nothing about this process was unconscionable. *See, e.g., Brown v. Pacific Life Ins. Co.*, 462 F.3d 384 (5th Cir. 2006) (declining to find unconscionable an arbitration clause in a financial services agreement).

Second, Plaintiffs' assert that the Investment Agreement is unconscionable or fraudulent because of an alleged conflict of interest between JIL and the LCIA due to a non-executive

director of JIL allegedly sat on the board for the LCIA. That allegation is demonstrably false, as the individual in question – Lord Daniel Brennan – was never in fact on the Board of Directors for the LCIA. (Brennan Aff., Exhibit 2 to Defendants' Emergency Motion to Seal, ¶¶ 9, 10.) Lord Brennan is merely one of the 1,600 members of that well-known and often-used dispute resolution association. *Id.* ¶ 12. He has nothing to do with the selection of arbitrators and no influence on who sits on a given arbitration panel. *Id.* ¶ 14. The allegations to the contrary are not based on Mr. Simirica's personal knowledge and are mere speculation at best and an outright misrepresentation at worst.[4]

Third, Plaintiffs argue that the arbitration clause is unconscionable because they did not have separate counsel at the time they entered into the Investment Agreement and because, they assert, King & Spalding was conflicted. Again, Plaintiffs assertion is demonstrably false. As set forth in the Affidavit of Mr. Sullivan and the attached exhibit, Plaintiffs did in fact retain separate counsel for purposes of the transaction, and they received from their counsel a written opinion analyzing the Agreement's arbitration provision and stating that it was enforceable. (Sullivan Aff. ¶¶ 21-22.)

Accordingly, none of Plaintiffs' arguments against enforcing the arbitration provision have any merit.

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[4] Indeed, the allegation is especially disconcerting given that a judge in this district has already found that Plaintiffs' counsel has brought litigation in this district in bad faith, a determination that ultimately led to a settlement with counsel in which counsel paid attorney's fees and costs and agreed to participate in a CLE that would include ethics training. *See In Re St. Stephen The Great LLC*, Bankruptcy Court Case No. 08-33689. A transcript of proceedings in that case is attached hereto as Exhibit 2 along with the order on approving the settlement with counsel. In the transcript, Judge Isgir states the Court's finding "that this [case] was filed in the utmost of bad faith from everything I've heard" and that "it was not filed for any legitimate purpose." *Id.* at 25.

III. DISMISSAL IS THE APPROPRIATE REMEDY.

When all of the claims asserted in a complaint are subject to arbitration, dismissal is the appropriate remedy. *See Heller v. Tesco Corp.*, H-09-0370, 2009 U.S. Dist. LEXIS 64007 (S.D. Tex. July 22, 2009) ("Here, because 'all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose.'" (quoting *Fedmet Corp. v. M/V VUYALYK,* 194 F.3d 674, 678 (5th Cir. 1999).)

That is the case here. All of the claims asserted by Plaintiffs against JIL and the other Defendants are subject to arbitration under the Agreement. Retaining jurisdiction over this matter would not serve any purpose. The Court should dismiss the Complaint.

IV. DEFENDANTS ARE ENTITLED TO AN AWARD OF THEIR FEES.

Section 15.7 of the Agreement provides for an award of costs and expenses, including attorneys' fees, to any party required to seek judicial relief to enforce the Agreement's arbitration provision. Accordingly, Defendants ask the Court to order payment of their costs and expenses, including attorneys' fees, for pursuing this motion and any other appropriate relief. Upon entry of the Court's order, Defendants will submit itemized invoices reflecting these costs and expenses.

V. CONCLUSION

Because the parties' Agreement requires all of the claims asserted in this action to be submitted to binding arbitration, Defendants ask the Court to dismiss the Complaint, award Defendants their costs and expenses, including attorneys' fees, for pursuing this motion, and all other just and proper relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2011, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON

S&T OIL EQUIPMENT & MACHINERY LTD., VALERIAN SIMIRICA,	)	
vs.	)	Cause No. H-11-542
JURIDICA INVESTMENTS, LTD., JURIDICA CAPITAL MANAGEMENT LIMITED) JURIDICA CAPITAL MANAGEMENT (US) INC.)	)	

DECLARATION OF PAUL SULLIVAN

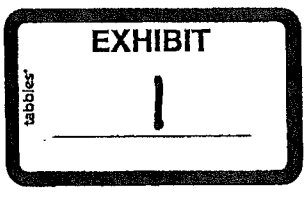
1. My name is Paul Sullivan.

2. I am over 18 years old; I am competent to testify in this matter; and I have personal knowledge of the matters set forth below.

3. I am the Senior Vice President for Juridica Capital Management (US) Inc. ("JCMUS"), one of the named defendants in the above action. Since April 1, 2008, I have been a Member of the law firm of Fields Sullivan PLLC (originally called "Fields & Scrantom PLLC" and then "Fields Scranton Sullivan PLLC," and herein referred to as "FS").

4. JIL is a limited company organized and existing under the laws of Guernsey, which is located in the Channel Islands about thirty (30) miles off the coast of France. JIL's sole place of business is in Guernsey. JIL maintains its only offices there; and its registered agent is located there.

5. JIL provides strategic capital to the business community and the legal markets for corporate claims, otherwise referred to as "alternative litigation finance." This market is an alternative to more traditional forms of financing litigation, including self-financing or financing through attorney contingency fees. JIL participates in one segment of this broader market, focusing exclusively on providing litigation financing to sophisticated businesses that are



involved in expensive, complex, high-risk commercial legal disputes. JIL is a closed-ended investment company whose shares are listed on the AIM, an alternative market operated by the London Stock Exchange. The overwhelming majority of JIL's shares are held by major British investment institutions. JIL's only offices are in Guernsey, as is its registered agent. JIL does hot have any offices, officers or employees outside of Guernsey.

6. JIL has an Investment Management Agreement with Juridica Capital Management Limited ("JCML"), a limited company organized and existing in Guernsey. JCML's sole place of business is in Guernsey. JCMUS is a Delaware corporation (incorporated on November 14, 2008, more than five months after the execution of the Investment Agreement referred to below) that is an indirect wholly-owned subsidiary of JCML. JCMUS engages in marketing activities and conducts due diligence on potential investments in the U.S. by JIL.

7. I participated in the due diligence related to the negotiation of the Investment Agreement between JIL and the Plaintiffs in this action, Valerian Simirica and S&T Oil Equipment and Machinery Ltd. ("S&T Oil").

8. Mr. Simirica informed me during this time that he had wide-ranging interests and that he had participated in a number of sophisticated business transactions. Based on my conversations with him, I understand Mr. Simirica to be a sophisticated, international businessman. Through S&T Oil, Simirica purchased a large, formerly state-owned industrial company in Romania that was privatized by the government of Romania in 2002. The company – Nitramonia SA – converted natural gas into ammonia.

9. JIL was approached in 2008 about the possibility of investing in an international arbitration filed by Simirica and S&T Oil against the government of Romania.

10. In connection with this potential investment, JIL received information from Global Arbitration Litigation Services Ltd. ("GALS"), a broker operating out of England and engaged by Plaintiffs and/or their representatives.

11. According to information provided by GALS to JIL, at one point, Nitramonia accounted for 20% of Romania's daily natural gas consumption.

12. In their international arbitration against Romania, Plaintiffs claim that, in 2007, the Romanian government terminated the privatization contract with Plaintiffs, seized the Nitramonia assets, and sold them for scrap value.

13. To challenge this action, Plaintiffs hired the international law firm of King & Spalding LLP to commence an arbitration against the government of Romania (the "Romanian Arbitration"). Plaintiffs filed the Romanian Arbitration in the International Center for the Settlement of Investment Disputes ("ICSID"), which is located in Washington D.C. Plaintiffs also filed an action in a Romanian court to challenge the seizure.

14. GALS approached JIL about investing in the Romanian Arbitration in 2008. Because the arbitration fell within the type of sophisticated, commercial cases in which JIL typically invests, after conducting due diligence, JIL agreed.

15. JIL and Plaintiffs subsequently negotiated and executed the Investment Agreement, which has been previously filed with the Court (the "Agreement"). Under that Agreement, JIL agreed to reimburse Plaintiffs' counsel for certain fees incurred to that date and to make certain funds available to cover the remaining costs of the Romanian Arbitration. JIL's total investment under the Agreement was to be in excess of $2.8 million.

16. The Agreement includes a mandatory arbitration provision that requires all disputes between the parties and other identified entities to be submitted to binding arbitration.

In fact, the very first page of the Agreement notified Plaintiffs of this fact. Only four pieces of information are contained on this page – the parties to the agreement, the date, a copyright notice, and the following sentence, in at least 14 point type: "THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION." The Agreement was submitted as Exhibit 2 to Mr. Simirica's affidavit in support of Plaintiffs' request for injunctive relief.

17. Section 15.0 of the Investment Agreement then contains nine (9) separate paragraphs setting forth the scope and details of the arbitration provision. Specifically, Section 15.2 states that all disputes – regardless of the theory of liability – are subject to arbitration:

> Except as otherwise (but only to the extent) specified in Section 16 [which deals with foreclosing on security interests], all actions, disputes, claims and controversies under common law, statutory law or in equity of any type or nature whatsoever, whether arising before or after the date of this Agreement and whether directly or indirectly relating to: (a) this Agreement and/or any amendments and addenda hereto, or the breach, invalidity or termination hereof; (b) any previous or subsequent agreement between ASSIGNEE AND ASSIGNTORS; (c) any act committed by ASSIGNEE or by any parent company, subsidiary or affiliated company of ASSIGNEE (the "ASSIGNEE Companies"), or by any employee, agent, officer or director of an ASSIGNEE Company whether or not arising within the scope and course of employment or other contractual representation of the ASSIGNEE Companies (provided that such act arises under a relationship, transaction or dealing between ASSIGNEE and ASSIGNORS); (d) any act committed by ASSIGNORS or by any parent company, subsidiary or affiliated company of S&T (the "ASSIGNOR Companies"), or by any employee, agent, officer or director an of ASSIGNOR Company whether or not arising within the scope and course of employment or other contractual representation of ASSIGNOR Companies (provided that such act arises under a relationship, transaction or dealing between ASSIGNEE and ASSIGNORS); and/or (e) any other relationship, transaction or dealing between ASSIGNEE and ASSIGNOR (collectively the "Disputes"), will be subject to and resolved by binding arbitration.

18. Section 15.3 provides that all arbitrations under the Agreement shall be conducted in accordance with the Rules of the London Court of International Arbitration (the "LCIA").

19. Section 15.4 provides that the "seat and situs of the arbitration and of all oral arbitration hearings will be in St. Peter Port, Guernsey, Channel Island" – the site of JIL's sole place of business and the jurisdiction under whose laws JIL is organized.

20. The Agreement also provides that it shall be governed by the laws of England and Wales. (Agreement § 14.2.1.)

21. Attached to the Agreement as Exhibit 4 is an opinion from Stuart Spiegel of the Law Offices of Spiegel and DeMars in Chicago, Illinois, dated May 23, 2008, to both S&T Oil and Simirica with respect to the enforceability of the arbitration provision.

22. In the executed version of that written opinion, which is attached hereto as Exhibit1, Mr. Spiegel advised Plaintiffs that the Agreement was governed by the laws of England and Wales and that it contained a mandatory arbitration provision that would be enforced by state and federal courts in Plaintiffs' home jurisdiction, Illinois:

> In any action or proceeding arising out of or relating to the Investment Agreement in any court of the State of Illinois or in any federal court sitting in the State of Illinois, such court would recognize and give effect to the provisions of the Investment Agreement wherein the parties thereto agree that the Investment Agreement shall be governed by, and construed in accordance with, the laws of England and Wales and that all Disputes are governed by the mandatory arbitration provisions of Section 15.

23. JIL paid more than $2.8 million in fees and costs under the Investment Agreement throughout 2008 and 2009.

24. In late-2009, Plaintiffs' counsel in the Romanian Arbitration abruptly withdrew. In its follow-up investigation, JIL learned that Plaintiffs had made material misrepresentations and omissions during the time period leading up to execution of the Agreement. JIL responded by filing an arbitration with the LCIA on December 23, 2010, alleging breach of the Agreement, fraud and related claims.

25. Plaintiffs have thus far refused to respond to the pending arbitration in the LCIA. Instead, Plaintiffs filed this action on February 14, 2011.

26. Plaintiffs' Complaint alleged claims against JIL, JCML and JCMUS. Plaintiffs purport to plead claims for RICO under 18 U.S.C. §1962; interference with a contractual relationship; fraud; conspiracy; aiding and abetting breach of fiduciary duty; declaratory judgment and an injunction.

27. JIL is controlled and directed by a three-member board of directors. JIL's board consists of Lord Daniel Brennan, Q.C., a British citizen who lives in England; Richard D. Battey, a British citizen who lives in Guernsey; and J. Kermit Birchfield, an American citizen who lives in the United States. JIL's board of directors meets in-person on a quarterly basis. The vast majority of the board meetings have been conducted in-person in Guernsey.

28. All contracts entered into by JIL are executed and delivered in Guernsey. JIL maintains its accounts in Guernsey; it holds its funds in banks located in Guernsey; it disburses funds used for its investments from Guernsey; and all proceeds JIL receives from its investments are remitted to bank accounts in Guernsey. Consistent with this general practice, the Investment Agreement at issue here was executed in Guernsey, and JIL wired the money to fund its investment from its accounts in Guernsey.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/23/11

Paul Sullivan

EXHIBIT 4
TO
INVESTMENT AGREEMENT

May 23, 2008

Juridica Investments Limited
Bordeaux Court
Les Echelons, St. Peter Port
Guernsey GY1 6AW
Channel Islands

Gentlemen:

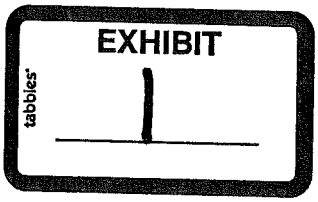
This opinion is furnished to you pursuant to Section 11.2.2 of the Investment Agreement, dated as of May 23, 2008 and the Schedules and Exhibits attached thereto (the "Investment Agreement"), between S&T Oil Equipment and Machinery Ltd., a corporation incorporated under the laws of the State of Illinois and having a place of business in the State of Illinois ("S&T"), and Mr. Valerian Simirica (the "Assignors"), and you, as "Assignee" named as such therein. Terms defined in the Investment Agreement are used herein as therein defined.

We have acted as counsel for the Assignors in connection with the preparation, execution and delivery of, and the investment made under, the Investment Agreement.

In that connection, we have examined:

(1) The Investment Agreement and the Exhibits attached thereto.
(2) The documents furnished by the Assignors pursuant to provisions of the Investment Agreement.
(3) The Articles and By-Laws of S&T (the "S&T Documents").
(4) The Certificate of the Secretary of State of Illinois, dated May 23, 2008, attesting to the continued corporate existence and good standing of S & T in that State.

We have also examined the originals, or copies certified to our satisfaction, of the documents listed in a certificate of the chief financial officer of S & T, dated the date hereof (the "Certificate"), certifying that the documents listed in such certificate are all of the indentures, loan or investment agreements, leases, guarantees, mortgages, security agreements, bonds, notes and



other agreements or instruments, and all of the orders, writs, judgments, awards, injunctions and decrees, which affect or purport to affect the Assignors' right to convey the Assigned Percentage to the Assignee or the Assignors' obligations under the Investment Agreement or the right of the Assignors to grant the security interest over the Collateral or to consummate the transactions contemplated by the Investment Agreement. In addition, we have examined the originals, or copies certified to our satisfaction, of such other corporate records of the Assignors, certificates of public officials and of officers of the Assignors, and agreements, instruments and other documents, as we have deemed necessary as a basis for the opinions expressed below. As to certain matters of fact material to such opinions, we have relied upon certificates of the Assignors or its officers or of public officials. We have not otherwise independently established the facts. We have assumed the due execution and delivery, pursuant to due authorization, of the Investment Agreement by the Assignee.

Our opinions are limited to the laws of the State of Illinois and the Federal laws of the United States and we do not express any opinion herein concerning any other law.

Based upon the foregoing and upon such investigation as we have deemed necessary, and subject to the qualifications set forth herein, we are of the following opinion:

1. S & T is a corporation duly incorporated, validly existing and in good standing under the laws of the State of Illinois.

2. The execution, delivery and performance by S & T of the Investment Agreement is within its powers, have been duly authorized by all necessary action, and do not (i) result in any violation of the S & T Documents or (ii) result in any violation of any law, rule or regulation applicable to S & T or (iii) result in any violation of any contractual or legal restriction contained in any document listed in the Certificate or, breach or result in a default under, or result in the acceleration of (or entitle any party to accelerate) the maturity of any obligation of the Assignors under, or result in or require the creation of any lien upon or security interest in any property of the Assignors pursuant to the terms of, any agreement or instrument listed in the Certificate, or to the best or our knowledge, contained in any other similar document.

3. The Investment Agreement has been dully executed and delivered on behalf of the Assignors.

4. No authorization, approval or other action by, and no notice to or filing with, any governmental authority or regulatory body or any third party that is a party to any of the agreements and instruments listed in the Certificate is required for the due execution, delivery and performance by the Assignors of the Investment Agreement.

5. In any action or proceeding arising out of or relating to the Investment Agreement in any court of the State of Illinois or in any federal court sitting in the State of Illinois, such court would recognize and give effect to the provisions of the Investment Agreement wherein the parties thereto agree that the Investment Agreement shall be governed by, and construed in accordance with, the laws of England and Wales and that all Disputes are governed by the mandatory arbitration provisions of Section 15. Without limiting the generality of the foregoing, a court of the State of Illinois or a federal court sitting in the State of Illinois would apply the law of England and Wales in determining the enforceability of these provisions of the Investment Agreement, and

would not apply the laws of the State of Illinois, to determine or interpret these provisions of the Investment Agreement.

Both U.S. federal arbitration law and international arbitration treaties recognize the importance of party autonomy. U.S. courts must enforce arbitration agreements in accordance with the terms of the contract, and the law specified by the parties. Federal and State courts have generally upheld the enforceability of choice of law clauses, although these courts have differed on whether the law chosen by the parties governs both the substantive obligations between the parties and the procedural rules of arbitration.

However, if a court were to hold that the Investment Agreement is governed by the laws of the State of Illinois, to the extent that it reflects a party's unequivocal intent to do so, U.S. courts will wholly enforce a choice of law clause within a valid arbitration agreement, pertaining to both the substantive and procedural elements of an arbitration. Moreover, in international disputes, the Supreme Court has articulated an even stronger reason for U.S. courts to enforce arbitration agreements as written . In both domestic and international arbitration, only when there is ambiguity surrounding the proper application of the chosen law will a U.S. court stray from the parties express choice to resolve the parties' dispute and agree that the Investment Agreement might be, under the law of the State of Illinois, a legal, valid and binding obligation of the Assignors enforceable against the Assignors in accordance with its terms.

6. After thorough investigation, my office has identified the following liabilities which might have a materially adverse effect upon the financial condition of Mr. Valerian Simirica.:

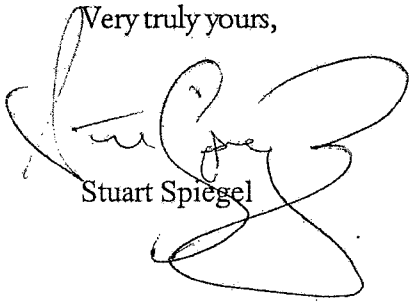
a) Mortgage foreclosure complaint filed on May 13, 2008, against one of the Assignors, Mr. Valerian Simirica, identified as Case No:08-CH-17515 pending in the Illinois Circuit Court of Cook County with a potential liability of the said Assignor for an amount of U.S. $957,536.53;
b) Outstanding Judgment entered against Defendant, Mr. Valerian Simirica by the Illinois Circuit Court of Cook Count in Case No: 06-M1-146471, for an amount of U.S.$9,822.45. No actions have been taken by the Plaintiff to collect on this Judgment
c) Contract complaint filed on February 15, 2008, against Mr. Valerian Simirica identified as Case No: 08-M1-112039, pending in the Illinois Circuit Court of Cook County with a potential liability of the said Assignor for an amount of U.S. $9,121.16;

The above cases are only referring to Assignor, Mr. Valerian Simirica and not to Assignor, S&T Oil and Equipment, LTD.

To the best of our knowledge, except for the cases mentioned above, there are no other pending or overtly threatened actions or proceedings against the Assignors before any court, governmental agency or arbitrator which purport to affect the legality, validity, binding effect or enforceability of the Investment Agreement or which are likely to have a materially adverse effect upon the financial condition or operations of the Assignors.

Our opinion in paragraph 5 above is subject to the effect of (i) any applicable bankruptcy, insolvency, reorganization, moratorium or similar law affecting creditors' rights generally, and (ii) general principles of equity, including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing (regardless of whether considered in a proceeding in equity or at law).

Very truly yours,



Stuart Spiegel

Law Offices Of Spiegel & DeMars
100 W. Monroe, Suite 910
Chicago, IL 60603
Phone: 312/726-3377
Fax: 312/782-3366

ENTERED
10/29/2008

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**CASE NO.**
ST STEPHEN THE GREAT, LLC	§	**08-33689-H1-7**
	§	**Chapter 7**
	§	
DEBTOR	§	

ORDER GRANTING TRUSTEE'S
MOTION TO COMPROMISE CONTROVERSY

CAME ON FOR CONSIDERATION, the Trustee's Motion to Compromise Controversy and it appearing that the Motion to Compromise Controversy has merit and should be granted; it is therefore

ORDERED that the Motion to Compromise be, and hereby is GRANTED; it is further,

ORDERED that J. Mark Brewer and the firm of Brewer & Pritchard, P.C. shall pay Randy W. Williams a total of $5,000 for costs incurred in this case, to be delivered to Randy W. Williams, Thompson & Knight LLP, 333 Clay St., Suite 3300, Houston, TX 77002 on or before the expiration of ten (10) days of entry of this order; it is further,

ORDERED that J. Mark Brewer and the firm of Brewer & Pritchard, P.C. shall pay Thompson & Knight LLP a total of $5,000 for attorney fees and costs provided to the Trustee in this case to be delivered to Randy W. Williams, Thompson & Knight LLP, 333 Clay St., Suite 3300, Houston, TX 77002 on or before the expiration of ten (10) days of entry of this order; it is further,

ORDERED that J. Mark Brewer and the firm of Brewer & Pritchard, P.C. shall pay the sum of $325 to the U.S. Trustee for outstanding and unpaid fees in this case to be delivered to the United States Trustee, c/o Nancy Holley, 515 Rusk Avenue, 3rd Floor, Houston, TX 77002 on or before the expiration of ten (10) days of entry of this order; it is further,

ORDERED that J. Mark Brewer and the firm of Brewer & Pritchard, P.C. shall pay the sum of $5,000 to the Clerk of Court for the U.S. Bankruptcy Court to be delivered to Michael N. Milby, Clerk of Court, 515 Rusk Avenue, Houston, TX 77002 on or before the expiration of ten (10) days of entry of this order; it is further,

ORDERED that J. Mark Brewer shall complete a minimum of ten (10) hours of Continuing Legal Education ("CLE") in a course on bankruptcy law approved by the State Bar of Texas on or before six (6) months from entry of an order approving the compromise and file a sworn notice of completion in this case within ten (10) days from completion; and it is further,

ORDERED that any such CLE shall contain a minimum of two (2) hours of CLE approved for ethics.

DATED: 10/27/08

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§	CASE NO. 08-33689-H1-7
	§	
	§	
ST STEPHHEN THE GREAT, LLC	§	HOUSTON, TEXAS
	§	AUGUST 28, 2008
DEBTOR	§	11:03 A.M. TO 1:38 P.M.

MOTION TO DISMISS

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR DEBTOR:	SEE NEXT PAGE
FOR CREDITORS:	SEE NEXT PAGE
COURT RECORDER:	EBONEE SPENCER

PREPARED BY:

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APPEARANCES:

FOR THE DEBTOR:

MR. J. MARK BREWER
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HOUSTON, TEXAS 77056
(713) 209-2950

FOR U.S. TRUSTEE:

MS. ELLEN HICKMAN
OFFICE OF U.S. TRUSTEE
515 RUSK STREET, SUITE 3516
HOUSTON, TEXAS 77002
(713) 718-4650

AND

MR. RANDY W. WILLIAMS, TRUSTEE
THOMPSON & KNIGHT, LLP
333 CLAY, SUITE 3300
HOUSTON, TEXAS 77002
(713) 654-8111

HOUSTON, TEXAS; AUGUST 28, 2008; 11:02:40 A.M.

THE COURT: Please be seated.

Okay, *St Stephen the Great, LLC, it is 08-33689.*

I saw Mr. Williams here earlier today. Let's go ahead and make appearances and we'll get started. Go ahead.

MR. BREWER: Morning, Your Honor.

THE COURT: Morning, Mr. Brewer.

MS. HICKMAN: Your Honor, Ellen Hickman on behalf of the U.S. Trustee, although I did not intend to make an appearance, just to observe the hearing.

THE COURT: Thank you. Why don't you just have a seat? Here's Mr. Williams walking in now.

Mr. Williams, that will teach you to show up early. Go ahead and make your appearance for the court reporter, Mr. Williams.

MR. WILLIAMS: Randy Williams, W-i-l-l-i-a-m-s. I'm the Chapter 7 Trustee in the St. Stephen the Great, LLC case.

THE COURT: All right, this is a motion to dismiss the case altogether on the Trustee's motion. I'm going to find that service has now been made on all participants in accordance with the Bankruptcy Rules. All creditors have received notice. I have received no objections.

Mr. Williams, why don't you go ahead?

MR. WILLIAMS: Yes, Your Honor. I filed my motion to dismiss because after I was appointed this Chapter 7 Trustee in the case and began my investigation into what the business of the debtor was, who the debtor was and what was going on, it became apparent that what was filed with the Court, at least, based on the information that I've been able to obtain from various sources, including Mr. Brewer is that it's incorrect. And frankly, Your Honor, I'm not even sure that a case has actually ever been filed.

First, there is no entity registered in either the U.K. or the U.S. that goes by the name of St Stephen the Great, LLC. There is a St Stephen the Great, Limited, which is a U.K. registered company, but it is a limited co. They don't have the same limited liability company designation like we would have here in the State of Texas.

Mr. Brewer's explanation to me in an email was that that was under advice of a solicitor that they could use that name. But, he did confirm to me that no DBA had ever been filed, for example, in Harris County or anywhere in the U.K.

In addition, Your Honor, what is given under the request for social security or EIN number, the 119839 number is not the number for the St Stephen the Great, no

[sp.ph.] co. Its company number, according to documents that I got from parties in the U.K., is 06110519. It turns out that the 119839 number is the number of the registered charity, St Stephens Charitable Trust, which in the course of reviewing information related to this case, I came across a notice, a copy of a notice that was sent out under -- it says it was sent out. It was not signed, but sent out by Philip Brewer, who is the president of the Orthodox Church Mission Fund, but also listed as the president of the debtor in this case, that St Stephen the Great Company had under a contract with St Stephen the Great Charitable Trust in managing the various book stores in the U.K. and that that arrangement had been terminated effective June 1, 2008, and that management responsibility for the former, and they called them SPCK shops, would be vested in another party, and that party would be ENC Management Company, which I believe, although I've not been able to confirm this, is an entity that the Brewer's either created or controlled.

I don't believe, from information I've been provided from creditors, that all the book stores are still operating, although I do believe some of them may still be operating. But -- So, given -- Those were two issues just off the front page of the petition where I don't think we have a correct debtor name, we clearly don't have an appropriate number for the debtor that it is allegedly being

filed for. And my copy of the Docket Number 1, the original voluntary petition is only signed by Mark Brewer as attorney for the debtor. It is not signed by a representative of the company. And then when I reviewed the schedules and statements in the case and those are filed in the case. When you go to the signature pages for the various entities, for example, on the last page of the statement of financial affairs, it's dated June 19th, 2008, it's purportedly signed by a J. Mark Brewer, Chairman, but it is signed by permission of some other party with initials, which again, I think this goes to whether we even have -- the case was even properly filed in the first place.

I believe it also filed on Docket 23, it was addressed to the Clerk in the Court and signed by "Yours Sincerely, Outrageous." It also identifies the problem that I came across with the registration number, the EIN number being incorrect, and that's the Charity number, not the number for this purported debtor.

And in connection with various employment tribunal proceedings related to employees who are either dismissed or have claims against the debtor, I was sent a filing in Case No. 1500898/2008/D. It is styled Vendy and Others, and that's *Vendy versus St Stephen the Great, LLC, St Stephen the Great Charitable Trust and ENC Management Company* as respondents. And this appears to be an

informational filing. It says amendment to grounds of claim.

Under Paragraph 3 in this document, it says, "It became apparent at the time that the LLC suffix was an American term being used by the Brewer brothers to describe the identity of the claimant's employer. No evidence has yet emerged of any U.S. registered company of this name. And the only relevant limited company U.S. DAW has been able to identify is that of St Stephen the Great Limited, registered in England at Company's House under Company Number 06110519. And I bring that to the Court's attention because that's simply the lawyers for these claimants in this proceeding confirming the information that I've related to the Court that I've been able to pull together about this case.

And Your Honor, if I could, I've received on July 15th, 2008 from a Michael Wykes, W-y-k-e-s, Creditor Services for Moore Stephens, M-o-o-r-e S-t-e-h-e-n-s Chartered Accountants, a claim filed for Oxford University Press. Attached to that are their statement of account, which -- I bring this to Court's attention is because the party that they identifies the party to whom they were doing business and sent the invoices to is listed as SPCK Bookshops at a London address. And at least from the information that they're providing in this part of their

claim, again this SPCK name comes up, which isn't even the name that appears in connection with this case.

I also noted that on the petition, Your Honor, the debtor is listed as a tax exempt organization under the Internal Revenue Code. Since this entity is a foreign entity and does not appear to be registered as a charity, but as a company, I'm not sure the basis for that to have been checked. Further again, since there's no -- I'm aware of, there's no EIN related to these names.

In addition, it is clear from the creditors that have corresponded with me and that have made various findings with the Court that there was an entity similar to this name that apparently was conducting business in England and Wales running book shops. But, when you look at the schedules that are filed in the case, no asset is listed on Schedule A or B, and in fact, we don't have in the schedules or statements this relationship described where -- that is referred to in the notice that was sent out to the employees of the one book shop, but there was some kind of contractual relationship by which they were running the book shops.

However, even we have no assets listed on Schedule A or B, the petition block was check that estimated assets were $100,001 to $500,000. When I asked Mr. Brewer, you know, to explain this discrepancy he then referred to the fact that while there was a web-related business, which

was not disclosed in the schedules and statements that might be of some value. And I asked him why that was not listed on the schedules and never received an explanation for that.

I also found it unusual and inconsistent that Mr. Brewer said that he was accepting as a retainer to act as counsel in this case, $75,000, even though he's an interested party and insider, and even though he's not actually been paid anything.

The statement of financial affairs that are filed in the case do list millions of dollars in business related to whatever this business was over the last few years. But again, then we get back to there being no assets scheduled, and as well no bank account scheduled for this entity. And I believe that the lease that was identified on Schedule G was the lease for an office for the business of the debtor. We don't have one lease listed for all these book store operations that were there in England. And I believe that that may be the cause that those leases were actually with St Stephens, the Great Charitable Trust Entity, although, I don't have any -- I've not received any direct evidence of that.

In addition to those problems, Your Honor, there's a practical fact that, to the extent there is a St Stephens the Great Limited, it's a U.K. company. It had offices in the U.K. It operated businesses in the U.K. in

relation apparently with a sister company that's also a U.K. company. There is at least the one case these employment tribunal claims process that's ongoing over there -- ongoing over there, which not only is against purportedly this entity but those other two entity -- well, the other St Stephen the Great Trust Entity and Mr. Brewer, individually.

Various creditors want to make claims over there where they do still believe there is still a book shop operating. And given that there's no assets in this case, I don't have the funds to take off over there and begin to explore all these different entities and figure out what to do with this. And if there are going to be insolvency proceedings, it makes no sense that they would be instituted by creditors over there, ultimately, if that's the course that they chose to pursue in terms of unwinding what the relationship of this was or whether in fact this entity was a mere front piece for the true owner of the businesses, the charitable trust, which is another entity.

So, those are the bases I have, Your Honor, for filing my motion. I understand that I upset Mr. Brewer by the fact that in addition in my motion to dismiss I also designated that, to the extent that I believe that information had been filed which was inaccurate and wrong and was known to have been wrong at the time that it was filed, that I had forwarded this information to the U.S.

Trustee as I'm required to do, for them to conduct whatever investigation they felt necessary related to this and to also, if possible, refer this to law enforcement in the United Kingdom, since gain these entities, these business are all U.K. related.

Since there's no opposition to my motion, I can represent to the Court that every creditor to this case whose contacted me from the U.K. has asked that the motion be dismissed. Your Honor may recall at the time the case was converted, there were a few parties back then urging that the case be dismissed. What I hear from the people enough to contact me, they want to proceed with their claims over there as opposed to attempting to do through -- do so through a bankruptcy case in Houston, Texas. And I agree that I believe that that's the proper way for this to go forward, especially when I don't think we have a case actually properly filed to give this Court jurisdiction over the appropriate debtor and its assets to the extent it has any.

THE COURT: Thank you. Mr. Brewer?

MR. BREWER: Thank you, Your Honor.

It is most unfortunate that Mr. Williams, from the very moment that he took on the trustee role, refused to speak to me at any time, and devoted all his energies to trying to find out a way to get the case

dismissed, as he's just laid out for you.

It's interesting to note that all of what he's just said, we've not heard anything that the man has done as the trustee to try to do what's in the best interest of the debtor. And I need -- I need to clarify a number of things that he said. Now, I realize that a lot of things that I'm about to say, I told Your Honor two months ago. And if Mr. Williams had been here, he would know that, of course. But, just to -- just to reiterate them at this time. First of all, he states that in the United Kingdom, the debtor is known as SSG Limited. That's not correct. The name of the company as I believe I stated two months ago is St Stephen the Great. That's the name. The LLC describes what it is, just as limited does. It's also incorrect that in the United Kingdom, there's no such thing as a limited liability company. There are such things as limited liability companies.

It is true that they don't tend to refer to them as LLC's like we do. I mean, this is -- if you'll pardon me, Judge, this is really trying to cut a pretty fine line that has no purpose. There's no misrepresentation of who or what the debtor is. He specifically asked me about the numbers that were put on the petition, and there are two numbers. One of them is the equivalent of an EIN. It's the Charities Tax Exempt number. They don't call it tax exempt;

they call it a charity registration number. That's because they have a charity commission. We don't have such a thing.

If you go online, as I'm sure Mr. Williams has done, and you simply plug in that number on a Google.co- search, it's going to bring up this charity. And the official page for this -- pardon me, for this charity at the charity commission's website.

The other number is a company-house registration number, which is probably the closest thing that we have to that is the Texas Controller or Secretary of State in most other states where a company files for authorization to do business and they're given a certificate number. We get that in Texas too. It's just that in Texas, and in most other states, we don't tend to ever use that number, but it's on the certificate.

Now, in the U.K. on the other hand, they do use that number and they have a third number, and I think I went all over -- over all of this before, but the third number that they use, which we really don't have any equivalent to, is a VAT number, Valued Added Tax. Virtually, every non-individual in the United Kingdom has a VAT, if especially they're engaged in any sort of what they call a trading operation where they're either buying or selling stuff. That's the way their tax system works. St Stephen the Great does have a VAT number. I can't recall it

for you by heart, and I can't recall if it is specifically called out on the bankruptcy, the petition that was originally filed. There's probably no reason why it should have been.

As far as whether this is a United States tax exempt entity, I suppose that's a matter of opinion, but under the rules affecting 501c3's, I think it's well-known that a tax exempt entity has 18 months after its inception to apply for tax exempt status, and then it's retroactive. And I think it's also possible to file an application even later than that, but there is no U.S. tax I.D., tax exempt number -- excuse me, that's not stated correctly. There's no tax exempt letter from the United States IRS for this debtor, nor would there have needed to have been because it is not a U.S. company, as we all know.

It is, of course, the equivalent of tax exempt in the United Kingdom. Now, ever since the entity was formed, which was in February of last year, the company has identified itself as St Stephen the Great, LLC. The reason for that is, as I think Your Honor will recall, the charity commission instructed the trustees, of which I am one, of St Stephen the Great Charitable Trust to form a limited company so that it could conduct the book shop retail business under that legal umbrella. So the company was formed in either late January or early February. And in

roughly mid-June of last year, the charity commission issued a formal registration to that entity.

At that time it changed the registration, the charity registration number, of St Stephen the Great Charitable Trust to having identical number with the Charity, St Stephen the Great, LLC or the debtor in this case.

The only difference between the two is that the Charitable Trust was given the -1 number, so if you look at the original filing and you see, I think its 119839 or something like that. The Charitable Trust has the identical number with the addition of -1 at the end, because they are considered to be related charities, obviously. The difference being that the Charitable -- excuse me, the trading company, the debtor in this case is the entity that conducts the trading business or did until June of this year for the Charitable Trust.

The common about leases, if I could touch on that, I believe that I also explained this at the hearing we had two months ago, but when the Society for Promoting Christian Knowledge, SPCK for short, transferred the business of these book shops to the St Stephen the Great Charitable Trust. That occurred effective November 1st of 2006. There's a transfer document dated October 19th, 2006. When it transferred that business, it transferred the assets

and liabilities having to do with the 23 book shops into this Charitable Trust. Those included 11 different properties, which were either transferred in a free-hold or subject to a peppercorn for a seven-year period. So, for all intents and purposes are not only rent-free, but they are owned by the Charitable Trust.

Additionally, there were another 11 properties which were subject to some kind of a commercial lease of one kind or another. And those also were transferred to the Charitable Trust.

The final piece of property was property in the City of Bristol. And that was transferred originally as a part of a free-hold but SPCK had retained the right to sell it, which they then did in early -- I think March of last year. Consequently, the Charitable Trust negotiated for a new lease a few doors down. By the time the lease came into fruition, it was executed by St Stephen the Great, the Limited company that's the debtor in this case.

So, as of the time of the filing of this case, the only lease that had ever been a liability of this debtor was the property in Bristol. It never leased any of the other properties. Now, if I could just go back to what the Charity Commission said. The Charity Commission said they did not want --

THE COURT: What is EMC?

MR. BREWER: What?

THE COURT: What is EMC?

MR. BREWER: EMC is a management company that was incorporated by myself in Texas to conduct the ongoing operations of the book shops in a few of these locations, following the filing insolvency of the limited liability company.

THE COURT: This is the first I think I've heard of that, right? Did you describe that at the last --

MR. BREWER: I don't remember if we did or not.

THE COURT: Well, why didn't this entity that was going to file Chapter 11 continue the management?

MR. BREWER: Because --

THE COURT: Why wouldn't you transfer it to one of your own companies?

MR. BREWER: Because -- Because the Charity Commission would not permit to do so.

THE COURT: Would not permit who to do what?

MR. BREWER: It will not permit the Charitable Trust to conduct any trading operations whatsoever. That's --

THE COURT: Not the Charitable Trust.

MR. BREWER: -- the reason why --

THE COURT: Why is the LLC transferring all of its management rights to one of your other companies rather than

trying to stay in business?

MR. BREWER: It didn't transfer them to -- It's not the debtor that transferred, Your Honor. Those rights --

THE COURT: Well, you control both entities.

MR. BREWER: Right.

THE COURT: You terminated the LLC's rights to earn money from the management agreement, leaving all those creditors holding the bag, and you gave the management rights to one of your own companies. Why did that happen?

MR. BREWER: Well, first of all, Judge, it's not my own company. It's another charitable company. It's a tax exempt, tax free company. It's not a for profit venture.

THE COURT: Why did you transfer all the management rights from the LLC over to a new company and leave the creditors of the old company holding the bag?

MR. BREWER: Judge, what we did was try to move the business into independent management structure. And we have succeeded in doing that. That was really part of the reorganization idea that I had was that we would transfer these trading operations to parties -- generally the parties that had been managing the stores previously as far back as --

THE COURT: And why did you do that and leaving

all the creditors of this entity holding the bag?

MR. BREWER: We haven't left them holding the bag, Judge. We've been --

THE COURT: How are they going to get paid?

MR. BREWER: We've been working on pay-outs with all of them, especially since Mr. Williams' initial salvo to me that, you know, hey, this is a fraud and blah, blah, blah. And so --

THE COURT: Well, if you took all the revenue sources out of this company and put them into another company, both of which you manage, it seems to me the creditors of the one you took all the revenue sources out of are going to have a pretty hard time getting paid.

MR. BREWER: Except for the fact, Judge, that there isn't any net revenue. These companies, these book shops are loss-making ventures. They're not --

THE COURT: Then why did you put it in a new company?

MR. BREWER: Because that was the only way we could do it.

THE COURT: Why didn't you leave it in the old company?

MR. BREWER: Because, Judge, it was insolvent. And under charity law in the U.K., you're not allowed to continue to operate the company when you're insolvent. It's

a violation of their law. We did not have any choice but to put that company into either a U.K. insolvency or American bankruptcy.

THE COURT: And why it better in an American bankruptcy than a U.K. insolvency where they can decide if you're right about that?

MR. BREWER: As I said when you asked me that two months ago, it's because it's considerably cheaper here. Attorney's fees, for example, are less than half what they are in the U.K. The fees alone are significantly less. And all of these creditors have always dealt with the company here in Houston.

THE COURT: Why did you --

MR. BREWER: That's where all the administration has always been.

THE COURT: Why file bankruptcy at all?

MR. BREWER: They've all filed -- They --

THE COURT: Why file bankruptcy at all?

MR. BREWER: To prevent from being sued, the same reason any debtor would.

THE COURT: Well, why -- Who cares if the debtor gets sued? It has no assets.

MR. BREWER: Well, Judge, in due respect, I don't think that's a very good way to go about it, to just let them file suits and take judgments. Besides which, as he

pointed out, these employees, for example, have also brought claims against the Charitable Trust, which didn't even employ them. So --

THE COURT: Well, that's the Charitable Trust problem.

MR. BREWER: It is, but, you know, by just leaving people to just say, hey, go file suit, well, then that's what they're going to do; they're going to sue everybody.

THE COURT: Right.

MR. BREWER: So, I just don't think that's a very reasonable way to do it, frankly, but --

THE COURT: Well, what do you think ought to happen with this estate?

MR. BREWER: Well, what I thought should happen, and the way I filed it was as a reorganization so that we could, in a business-like manner, move into a new management agreement for each one of these stores so that the individual workforce that was there at the store could take over and run the shops. And then we could pay off the creditors as we went -- work out a pay out plan with the, which of course we've largely done anyway. And, you know, just try to go down the road and get some sort of a new footing to try to keep the businesses alive.

THE COURT: When did the EMC get formed up, and when did it get the management contract?

MR. BREWER: It only has a management contract for two or three shops.

THE COURT: And when did it get formed up?

MR. BREWER: It got formed in -- I believe in April of this year, but I'm not positive, Judge.

THE COURT: So that was before this entity filed Chapter 11?

MR. BREWER: Probably about six or eight weeks before.

THE COURT: So there were no revenues here?

MR. BREWER: No revenues where?

THE COURT: To reorganize in the entity that you filed bankruptcy for. How was it going to possibly reorganize if it had no revenues?

MR. BREWER: I'm not --

THE COURT: You've taken all the management contracts and put them into EMC. You're saying you filed a Chapter 11 so that they could reorganize. How can they reorganize with zero revenue?

MR. BREWER: Because, Judge, it's the same business. It's the same location; it's the same book shop.

THE COURT: So, they have none of the revenues of it. How could this entity reorganize?

MR. BREWER: Well, I'm not -- You mean the SSG?

THE COURT: No, the one you filed bankruptcy for,

the St Stephen the Great, LLC entity?

MR. BREWER: Well --

THE COURT: If all its revenues have been moved over to another entity, how in the world could it possibly reorganize?

MR. BREWER: Judge, as I tried to explain before, all SSG was and is was a management company.

THE COURT: Whatever it is --

MR. BREWER: So all --

THE COURT: You've just told me you did it so that it could reorganize. How was it theoretically possible for it to reorganize if it had no revenues?

MR. BREWER: What I was trying to say, perhaps -- When I say it's trying to reorganize, I'm talking about the overall charity.

THE COURT: I'm talking about the entity that you put into bankruptcy in my court. How could it reorganize? You put it in a reorganization Chapter 11, if you've taken all the revenues and put into a sister company; how could the company that you put into bankruptcy reorganize in a Chapter 11?

MR. BREWER: Well, when you asked me that two months ago, my answer was that it was, I thought a self-liquidating reorganization. That's -- That was my understanding what we were trying to accomplish.

THE COURT: Okay. Then what would it liquidate?

MR. BREWER: What I discussed -- What I discussed with the solicitors and the insolvency experts earlier in this year in the U.K. was that we needed to form these separate entities to take over the management, basically to create a bridge to get the new managers in place, which we've done --

THE COURT: What did this entity have to liquidate?

MR. BREWER: Well, I did file an amended schedule, which counsel didn't mention, but I -- I've got in here -- There's a lot of litigation that's worth 6.6 million dollars, according to our estimates. It's got a couple of small debts, and then it's got about $155,000 worth of retail purchasers who buy on account. So, these are all assets that should be collected and used to distribute to the creditors.

THE COURT: Who are Greenfield Dosser and Kingston?

MR. BREWER: These are individuals. Greenfield is an individual who is a member of the clergy staff at one of the cathedrals where we have a book shop, who, in writing, called for a boycott of that particular shop and caused her to be shut down.

THE COURT: How come those things weren't listed

in your original petition?

MR. BREWER: I don't have an answer for that, Judge. I mean --

THE COURT: I am dismissing this case.

MR. BREWER: Okay.

THE COURT: I think that this was filed in the utmost of bad faith from everything I've heard.

MR. BREWER: Judge, I told you I --

THE COURT: I'm telling you what I have found.

MR. BREWER: And I tried to do the best I could.

THE COURT: Quiet. This case was filed in the utmost of bad faith.

MR. BREWER: No, it wasn't, Judge.

THE COURT: Stop. This case was filed in bad faith. It was not filed for the benefit of the creditors or of the estate in any way of the entity that filed bankruptcy. It should not have been filed at all. It should not have been filed in the United States if it was going to be filed. It was filed here to hide from creditors from everything that I can tell. It was filed to support, apparently, some other entities that are controlled by the Brewers. And it was not filed for any legitimate purpose.

I do not know if it was filed in a fraudulent or criminal matter -- manner, and I will leave that up to the United States Trustee to investigate.

This case is dismissed. It is dismissed with prejudice. We will retain jurisdiction for 60 days to take any sanctions motions that might be filed against the filers of this case.

We're in adjournment.

(These proceedings concluded at 11:38:03)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s lmartin

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JUDICIAL TRANSCRIBERS OF TEXAS, INC.

JTT JOB/INVOICE # 27519

DATE: APRIL 20, 2009

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